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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 CISCO SYSTEMS, INC.,

19 Plaintiff,

20 v.

21 ARISTA NETWORKS, INC.,

22 Defendant.
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Case No. 5:14-cv-05344-BLF (NC)

**DEFENDANT ARISTA'S OBJECTIONS
TO PLAINTIFF CISCO'S 12/02/16 TRIAL
EXHIBITS AND DEMONSTRATIVES**

Dept.: Courtroom 3 – 5th Floor
Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

1 **Scope of Testimony for Frank Palumbo:** With respect to Cisco witness Frank Palumbo,
 2 the Court has previously ruled *in limine* that Mr. Palumbo's testimony should be limited to the
 3 Rule 30(b)(6) topics on which he was designated. Nov. 8, 2016 MIL Order at 11-12. Based on
 4 Mr. Palumbo's admission in deposition that he lacked personal knowledge on certain of the Rule
 5 30(b)(6) topics on which he was designated, Arista objects to any testimony from Mr. Palumbo
 6 inconsistent with the Court's Order.

7 Cisco designated Mr. Palumbo to testify on Arista's Rule 30(b)(6) Topics 54, 60-62, 106-
 8 07, 109, 113-16, 133. Ex. A, E. Cisco narrowed those topics to Cisco's marketing of products,
 9 including the Cisco CLI and/or embodying the patents-in-suit, any injury claimed by Cisco as a
 10 result of Arista's alleged infringement, including the identity of any sale lost to Arista, the
 11 demand for Cisco CLI, and attributes customers consider when deciding whether to purchase
 12 Cisco's products. Later, Cisco also designated Mr. Palumbo to testify about "Cisco's lost sales to
 13 the [30] lost sales customers identified in" its damages report." Ex. B.

14 Mr. Palumbo, however, disclaimed any personal knowledge about the following topics:
 15 the '526 patent, injury claimed by Cisco as a result of Arista's alleged infringement, including the
 16 identity of any sale lost to Arista, the demand for Cisco CLI, attributes customers consider when
 17 deciding whether to purchase Cisco's products, and Cisco's lost sales to the 30 lost sales
 18 customers identified in its damages report.

19 For example, Mr. Palumbo could not name a single sale Cisco had won on the basis of its
 20 CLI, nor did he know anything about the differences in the CLI supported by Cisco's operating
 21 systems. Ex. C at 13:6-14:15, 35:25-36:17. Mr. Palumbo did not know whether Cisco had ever
 22 investigated customer perceptions of its CLI commands, nor could he identify any way in which
 23 Cisco markets its CLI. *Id.* at 53:3-54:17. Mr. Palumbo also conceded that he had no "subject
 24 matter expertise" on the '526 patent. *Id.* at 93:14-96:22.

25 With respect to the 30 lost sales customers on which he was designated to testify, Mr.
 26 Palumbo conceded that he had no knowledge about the buying criteria for any of those customers,
 27 nor did he have communications with any of the customers relating to Arista's CLI being a reason
 28 they purchased Arista switches. Ex. D at 138:23-139:16; Ex. C at 25:14-26:20, 35:10-24, 89:18-

24, 91:4-25; Mr. Palumbo also could not identify any transaction Cisco lost to Arista for any of those 30 customers; he did not know whether any of those customers had stopped buying Cisco switches. Ex. C at 35:10-24; 24:1-21; 25:14-27:2, 38:24-40:13. Finally, Mr. Palumbo testified that he relied on hearsay to testify regarding certain of the 30 lost sale customers, having spoken to various other Cisco employees to educate himself on the topic. Even as to that, however, Mr. Palumbo had no knowledge concerning how his fellow Cisco employees knew that the CLI was critical to those customers, nor did they identify any customer representative who had ever stated that it cared whether Arista's CLI was Cisco-like. Ex. D at 17:17-18:15, 19:22-20:5, 20:12-22:8, 27:14-16, 154:13-21.

Jeffay Demonstratives: Arista objects to slides 15 and 72 of Dr. Jeffay's demonstratives, as they purport to instruct the jury on the relevant law.

Chevalier Demonstratives: Arista objects to slides 17-26, 34-35, 37, 42, 46, 51, 60-74, 76-90, 93-94 of Dr. Judith Chevalier's demonstratives. *First*, slides 35 and 72 cite documents that Dr. Chevalier never relied on in any of her reports (*see* objection to TX 472 & 4262 below). This is a clear violation of Rule 26(a)(2)(B). *See also* Pretrial Conf. Tr. at 47:3-20. *Second*, Slides 76-90 are unrelated to any issue that is before the jury. Instead, as is evident in Dr. Chevalier's expert report, the matters addressed in these slides—including lost profits from future sales, price erosion, etc.—are relevant Cisco's request for injunctive relief. *See* Chevalier Rpt. at ¶¶ 84-116 ("Evidence of Other Harms," "Permanent Injunction Considerations"). Because these issues are not relevant to anything the jury must decide, including damages in this case, they are highly prejudicial and misleading. *MediaTek Inc. v. Freescale Semiconductor, Inc.*, No. 11-CV-5341 YGR, 2014 WL 587098, at *3 (N.D. Cal. Feb. 13, 2014) (excluding evidence *in limine* from jury trial related solely to injunctive relief). *Third*, Slides 18-24, 26, 34, 64, 66-68, 73, 78-79, and 84 cite multiple snippets of deposition testimony that is both inadmissible and not in evidence. Fed. R. Evid. 402. *Fourth*, Slides 17, 25, 37, 42, 46, 51, and the titles to Slides 60-65, 67-74, 93-94 are argumentative. *See United States v. Freeman*, 498 F.3d 893, 903–04 (9th Cir. 2007) (an expert may not be used as a party spokesperson to provide an "additional summation" of evidence).

1 **TX Nos. 472, 693, 4262**: Cisco has disclosed numerous exhibits for Dr. Chevalier's
 2 testimony, that were never disclosed in any of Dr. Chevalier's three expert reports submitted in
 3 this case.

4 **TX Nos. 31, 505**: Arista objects to these exhibits as inadmissible hearsay. Cisco has
 5 failed to identify a non-hearsay purpose for these exhibits or explain how they would fall under a
 6 hearsay exception.

7 **TX Nos. 805, 808, 809**: Arista objects to Summary Exhibits 805, 808, and 809. These
 8 exhibits are not summaries of admissible evidence, they are summaries of Dr. Chevalier's expert
 9 opinions. The bottom line of each exhibit is the figure Dr. Chevalier asserted as her opinion of
 10 lost revenues, lost profits, and but-for market share. The summaries do not summarize admissible
 11 evidence, nor can they, because built into them are Dr. Chevalier's own opinions. *See Peat, Inc.*
 12 *v. Vanguard Research, Inc.*, 378 F.3d 1154, 1159–63 (11th Cir. 2004) (“[B]ecause summaries are
 13 elevated under Rule 1006 to the position of evidence, care must be taken to omit argumentative
 14 matter in their preparation lest the jury believe that such matter is itself evidence”; criticizing
 15 “conclusory statements and claims” and “suggestive headings” in summary exhibit) (internal
 16 quotation marks omitted); *United States v. Bray*, 139 F.3d 1104, 1110–11 (6th Cir. 1998)
 17 (summary exhibits may not be “embellished by or annotated with the conclusion of or inferences
 18 drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or
 19 otherwise [A] summary containing elements of argumentation could very well be the
 20 functional equivalent of a mini-summation by the chart's proponent every time the jurors look at
 21 it during their deliberations.”). There is no admissible evidence in this case that states what
 22 Cisco's lost profits are, or a but-for market share. These exhibits can be demonstratives, but they
 23 should not be evidence that is sent to the jury room.

24 **TX 3505**: Portions of Exhibit 3505 are barred by FRE 402 and 403. Just as this Court
 25 granted Arista's motion to exclude references to the ITC investigations, it should likewise bar any
 26 statements concerning other litigation by or against Arista. *See* Nov. 8, 2016 MIL Order at 7-8.
 27 These portions of Exhibit 633 are also irrelevant to the limited scope of topics on which Dr.
 28 Chevalier can testify, and are therefore unduly prejudicial and inadmissible.

1 **TX 4745**: Arista objects to Exhibit 4745 as hearsay.

2 Dated: December 1, 2016

KEKER & VAN NEST LLP

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By: /s/ Robert A. Van Nest

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ROBERT A. VAN NEST

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ARISTA NETWORKS, INC.

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